MAINTAINING RELIGIOUS IDENTITY IN HIRING IN FAITH-BASED SCHOOLS: A COMPARATIVE ANALYSIS OF AUSTRALIA AND NEW ZEALAND

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In an article in Volume 21 of the International Journal of Law and Education, Charlie Russo and Keith Thompson compared the law governing ethos preservation in faith-based schools in the United Stated (US) and Australia. In this article, Keith Thompson compares the Australian and New Zealand (NZ) positions, building on the description of the Australian law set out in the earlier article. This comparison is different because, although there is no federal dimension to NZ law, Australia and NZ share their British Commonwealth background and it is therefore unsurprising that their issues have a familiar spirit. Despite a tradition that tolerates and even celebrates religious diversity and choice, neither country has taken serious steps to ensure ethos preservation in private religious schools. While both countries have signed on to the UN instruments that are generous enough to enable such protection, neither has domesticated the relevant passages. Australia presents as slightly 'safer' for the administrators of faith-based schools because the added layer of federal law provides protection that is lacking at the state levels in Australia and in NZ generally. The article concludes with general suggestions to assist faith-based school administrators.

I Introduction

Like the US and Australia, New Zealand (NZ) has become a secular country, yet retains a significant portfolio of faith-based primary and secondary schools. While NZ census data confirms that religious faith is declining,[1] other statistics indicate that faith-based primary and secondary schools are as attractive to NZ parents as they are to those in the US and Australia.[2] The sociological analysis suggesting that institutional religion is losing its convincing power in the US and Australia in favour of a generalized spirituality, coupled with respect for some form of transcendence, appears to be equally applicable in NZ, especially for those raising children.[3]

The narrow focus of this paper is whether the ethos of faith-based schools in NZ should change if it is part of the reason why a school's brand of private education is attractive to parents and caregivers. Or, is it possible within the constraints imposed by enlarged anti-discrimination laws, to insist that teaching staff and students continue to observe the rules of conduct which are an integral part of the attraction of the faith-based school? Put another way, do religious freedom exemptions preserve space within which school administrators can go about their faith-based school business as usual?

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This paper seeks to provide practical answers to these questions in Australia and NZ. This paper surveys the relevant constitutional and anti-discrimination laws in Australia, albeit briefly because the law was set out more completely in the earlier article, and then within NZ, providing more coverage. The paper then offers suggestions for school administrators who are wrestling with the challenge of preserving ethos against pressures to change them and then make comments for administrators in schools where accommodation has been agreed but is being implemented in stages with various degrees of staff and parental resistance. The paper concludes with international comparisons. While the paper can point to patterns of change occurring in each country, the differing religious freedom contexts mean that some of the changes occur in a different order. The unitary nature of NZ's government and the smaller market size see some of its residents unphased by the subject matter of this paper. But, it is also possible that rapid social changes followed by prompt legislative responses on other underlying issues will have to be grappled with in the future. Following this comparative analysis, the article ends with a brief conclusion.

II Comparative Analysis

A Australia

Australia has no Bill or Charter of Rights and the provision in its *Constitution* protecting the "free exercise of religion" and preventing the establishment of religion does not obviously conflict with the State anti-discrimination laws that currently raise most issues for school administrators.[4] To the extent that religious freedom is protected in practice in Australia, such safeguarding is the product of custom protected by common law presumptions, together with a patchwork of state and federal anti-discrimination laws and exemptions.

While the Australian and US 'establishment clauses' are almost identical,[5] the Commonwealth funding of faith-based schools does not offend the Australian establishment clause,[6] though recent cases have limited the way in which that funding may be provided.[7] Those results reflect the High Court's respectful view of precedent and the federal government's pragmatism – nearly 35% of all primary and secondary students are educated in private schools, most of which are faith based, and the federal government spends roughly 35% of the national education budget on funding those schools.[8] To modify the status quo would require a massive and unpopular change which would unseat whichever government made the attempt.

The real issue for faith-based school administrators in Australia is with state-based anti-discrimination laws. Most anti-discrimination laws do not direct the Tribunal members who adjudicate the cases arising under them to balance religious freedom against the protections they afford to other groups that have traditionally missed out on equality protection. NSW's anti-discrimination law is a case in point. Even though this law outlaws discrimination on many grounds,[9] religious belief or practice is not included, and the general exemption extended to religious bodies only protects them from anti-discrimination litigation when they are propagating their beliefs. The law neither protects personal religious beliefs or practice nor does it protect religious practices within faith-based schools.

The federal government's disinclination to protect religious freedom throughout the country with the legislation recommended by the Human Rights and Equal Opportunity Commission in 1998, has left room for state governments actively to reduce the liberty of those who practice religion including in faith-based schools. The best example of apparent state antipathy towards religious practice in schools is in Victoria where the State government closed down religious

education in public schools[10] and voiced its intention to mandate the implementation of the controversial 'Safe Schools' program in all Victorian schools, public and private.[11]

Other states and the federal government have withdrawn their support for the more controversial aspects of this so-called anti-bullying initiative[12] after it was revealed that it intended the inclusion of gender-neutral stereotypes in all texts including mathematics. While faith-based schools are interested in reducing bullying, they have not wished to do so in a manner that would offend parents drawn to their religious ethos when there were other ways to achieve the anti-bullying objective.

Other cases that have concerned faith-based school administrators include the 1997 failure of the LDS (Church of Jesus Christ of the Latter Day Saints) Church to succeed in its defense of its 'temple worthiness' requirement in the Federal Court;[13] the hugely expensive legal battle fought by two evangelical pastors when Muslims found their preaching offensive under Victorian Anti-Religious Discrimination legislation;[14] and the ruling that the Brethren Church's refusal to hire their Philip Island convention centre to a gay organisation for a suicide prevention conference broke the law.[15] These cases have suggested that other practices of bodies affiliated with religious institutions including faith-based schools may no longer be protected under state or federal law in Australia.

This fear has escalated because two of these cases took place in the State of Victoria which has a Charter of Rights theoretically modeled on the *International Covenant on Civil and Political Rights* (the *ICCPR*) which was supposed to protect conscientious religious objection. The failure of that State's Charter of Rights[16] to protect religious conscience and practice even though a supplementary State Anti-Religious-Vilification Act[17] was said to protect good faith religious instruction, have not helped.

Efforts to understand why the legislative protection has not prevented these incursions into religious liberty in Victoria has revealed that the legislators omitted the 'necessity language' of Article 18(2) of the *ICCPR* when they passed the Victorian Charter of Rights. That language should have made it easy for tribunals and courts to protect the liberty interests of the religious communities in the *Catch the Fires Ministries* and *COBAW* cases.

Yet, these issues in the large states of NSW and Victoria are not exceptional. Of even more concern to faith-based school administrators was the decision of the Tasmanian Anti-Discrimination Commission to investigate Martine Delaney's complaint against Catholic Archbishop Julian Porteous because the booklet he circulated to Catholic school parents and parishioners offended her.[18] Religious believers and institutions who observed the booklet's respectful treatment of marriage and of people living alternative lifestyles have been dismayed that a human rights based law would consider it for penalty.

The Tasmanian government subsequently reviewed its anti-discrimination legislation and announced that while it will be amended, it will not extend to the offending provision – s 17.[19] While some commentators have suggested that Tasmania's anti-discrimination law was the most generous in the country,[20] the serious consideration the Commission gave the Delaney complaint was more surprising because it was in the only state in Australia which purported to offer constitutional protection for religious practice since 1934.[21]

Absent a comprehensive federal Religious Freedom or Anti-Religious-Discrimination Act which trumps inconsistent state law where religious liberty is concerned, religious institutions including schools are obliged to understand and observe all the legislation containing anti-discrimination provisions and religious exemptions that apply federally and in their state. [22]

This paper does not detail the content of all the relevant provisions, but as in the earlier article, it includes a representative sample. New South Wales' *Anti-Discrimination Act 1977* was one of Australia's first anti-discrimination laws. Many of Australia's other jurisdictions used it as a template. It now outlaws discrimination on grounds of race,[23] gender,[24] marital status,[25] disability,[26] responsibility as a carer,[27] homosexuality,[28] HIV/AIDs, and age.[29] Discrimination is forbidden in relation to accommodation, employment, and education among other things. Vilification on grounds of race, transgender, homosexuality, and HIV/AIDS is likewise forbidden. Section 56 provides the following exemption for religious bodies:

56 Religious bodies

Nothing in this Act affects:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order,

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,

(c) the appointment of any other person in any capacity by a body established to propagate religion, or

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Before setting out a further sample, it must be observed that the above area of exemption is very small. It only applies if the education or employment relates to persons who serve as clergy in churches. Though this 'susceptibilities' exemption could be interpreted broadly to include religious practices within schools, administrators therein are not included unless they satisfy courts that their schools were established to propagate religion.

While various High Court judges have ruled that human rights guarantees are to be interpreted liberally so as not to nullify the protection intended to be given by the legislature,[30] that same generosity does not apply when the legislative language is restrictive, and a broad interpretation would not be afforded in favour of the exemption in this case because the core rights at issue are the anti-discrimination norms which are the subject of the instrument. It might be different if a religious freedom protection provision in a constitutional Bill of Rights or a standalone federal act protecting religious liberty implemented as an international religious freedom norm, instructed the court interpreting anti-discrimination legislation to be generous towards religious freedom exemptions so as not to nullify that protection.

To date, though, Australia has not taken steps to comply with its international obligations towards religious freedom. Those obligations and their current effect in Australian domestic law will be discussed later.

Section 82 of Victoria's updated[31] *Equal Opportunity Act* 2010 says:

Religious bodies

(1) Nothing in Part 4 applies to—

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

S.82(2) amended by No.26/2011 s.18(1).

(2) Nothing in Part 4 applies to anything done on the basis of a person›s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—

(a) conforms with the doctrines, beliefs or principles of the religion; or
(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

The Victorian exemption, again, is limited and only extends to the employment, education, or appointment of persons who will serve as clergy in churches. It does not aid primary or secondary schools or their administrators who are trying to preserve an ethos.

Sections 153, 195 and 351 of the *Fair Work Act 2009* (Cth) make almost identical provision to recognize and protect religious practice in relation to 'Modern Awards',[32] 'Enterprise Agreements'[33] and in general.[34] Then again, the protection is limited only to the employment, education, or appointment of persons who will serve as clergy in churches. It does not aid primary or secondary schools or their administrators who are trying to preserve an ethos.

Before discussing the potential influence that international declarations, treaties, and law may have on domestic Australian employer behavior, a further cross section of Australia anti-discrimination legislation must be considered. That is, three state Acts purport to provide protection from anti-religious vilification. They are, ss 16(o) and 19(d) of the Tasmanian *Anti-Discrimination Act 1998*, ss 7(i) and 124A of the Queensland's *Anti-Discrimination Act 1991* (s 7(i)), and the Victorian *Racial and Religious Tolerance Act 2001*.

Section 16(o) of the Tasmanian *Anti-Discrimination Act 1998* prohibits "discriminat[ion] against another person on the ground of…religious belief or affiliation" and s 19(d) makes it illegal to "incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of…the religious belief or affiliation or religious activity of the person or any member of the group."

Section 7(i) of the Queensland Act simply "prohibits discrimination on the basis of religious belief or religious activity" at work (Division 2), in education (Division 3), and in other areas (Divisions 4-9) which are not directly relevant to this paper. Section 124A makes the public incitement of hatred, serious contempt, or ridicule of anyone on grounds of religion, unlawful unless done "reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest".

The anti-religious discrimination regime in the Victorian *Racial and Religious Tolerance Act 2001* is spread over a few more sections. Section 8 provides that

> a person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons,

but ss 9 and 10 makes the incitor's motives and assumptions irrelevant, though s 11 provides a defence if the otherwise discriminatory conduct was "engaged in reasonably and in good faith" for artistic, academic, religious, scientific or public interest purposes. There is also an exception if the incitor intended the conduct not to be seen or heard by others.

It was the interpretation of the Victorian provision that prolonged the *Catch the Fires Ministry case.* At first instance, the adjudicating member of the Victorian Civil and Administrative Tribunal (VCAT) held that the disparaging comments made about Islam at an Evangelical Church conference were not protected because they were not made in good faith.

On appeal, Nettle J (now a Judge of the High Court of Australia) in the Victorian Court of Appeal, ruled that the finding of bad faith below was incorrect and directed that a new member of VCAT revisit the decision, but the parties were reconciled in the meantime. However, in the Queensland Anti-Discrimination Tribunal Sofronoff QC as President, decided more promptly that even though the religious vilification of Muslims in the case before him was proven, it was made in good faith during an election campaign and so was protected by the exemption in s 124A(2)(c) of the Act.[35]

The contrast between the ease with which Nettle J and Sofronoff QC reasoned that the 'good faith' exemption protected religious expression, and the first instance Member of VCAT could not, is striking. While it cost the church organisations financially, it would not raise concern if it were a one-off interpretive mistake by an inexperienced member of a minor tribunal. But those grounds for reassurance do not exist.

Because of VCAT's success in managing tribunal complaints in Victoria, almost all that state's tribunal decision-making has been consolidated under its umbrella. Moreover, it appears that Victoria's template success is being copied in other states, most recently where state administrative tribunal decision making in New South Wales was consolidated under the stewardship of the New South Wales Civil and Administrative Tribunal (NCAT). NCAT's record in balancing political expression motivated by religious belief has similarly not reassured those who feel entitled to more protection in the light of Australia's common law history and the intent of international human rights instruments.[36]

Carolyn Evans and Patrick Parkinson suggested that this trend of disfavour towards the protection of religious freedom has created general church sourced antipathy towards 'the human rights project' as a whole. They added that Church concerns effectively derailed the Rudd Government's Human Rights Bill project under the Chairmanship of Jesuit priest, Father Frank Brennan in 2010. Carolyn Evans outlined the primary concern of religious organisations about human rights legislation when she wrote about non-discrimination laws in 2012.[37] She said

> Most non-discrimination regimes, including Australia's, began with quite substantial exemptions for religious bodies from the provisions of at least some of the discrimination laws…. Over time, however, many countries, particularly in Europe, have seen the scope of exemptions for religious groups narrow. There has been increasing public debate in Australia over whether the exemptions in Australian discrimination Acts should likewise be narrowed.[38]

The concern of religious organisations is that religious freedom and the autonomy of religious institutions gets diluted as newer demands for equality claim that religious exemptions are privileges inconsistent with open-ended equality. Patrick Parkinson noted that even though churches want human rights recognized, they do not believe that Charters assist.[39] Their concerns stem from the perception that current standard form Charters "may be used to support agendas hostile to religious freedom", do not always "enact the grounds of limitation contained in Article 18" of the *ICCPR*, and that "governmental human rights organisations [can be]…rather selective about the human rights they choose to support."[40]

Most Christian organisations support the ideology of anti-discrimination laws. Yet, the narrow interpretive approach taken by the institutions implementing new versions of equality to 'genuine occupations requirements' for jobs in church institutions see the Christian "moral code"[41] sidelined. If the government or its supervising human rights institutions consider society's interest in promoting the new equality is sufficiently compelling, then they "curtail religious freedom"[42] to the extent required to achieve the government goal despite lofty pronouncements about the foundationality and even the non-derogability of freedom of conscience and religion. Quoting McConnell, Parkinson wrote that even though governments assert that they do not take sides when religious and philosophical differences arise in society, the more recent idea that all citizens and their institutions also need to be neutral prevents religious believers standing for anything they consider important.[43]

In the context of an evangelical school "established to provide an explicitly Christian environment for children and young people",[44] it is as reasonable for the sponsors to seek employees who adhere to "the fundamentals of the Christian faith" as it is for the proprietors of a Thai restaurant to prefer Thai employees or the owners of a gay bar to want "to appoint only gay staff".[45] "A right of positive selection is rather different from discrimination".[46] The law should not proscribe reliance on characteristics relevant to employment.[47] Such affirmative selection is essential to the maintenance of multiculturalism because it promotes diversity[48] while imbuing society with a hybrid vigour that is lost when the law imposes homogeneity requirements.

Parkinson observed that religious institutions are skeptical about the implementation of human rights Charters in Australia because Victoria did such a poor job of implementing the religious limitation in the *ICCPR*. Instead of copying it and confirming that religious freedom should only be limited if limitation is necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others",[49] the Victorian drafters created a general balancing provision with so much discretion that the necessity provision in Article 18(3) was eviscerated.[50]

Still, Parkinson concedes that even the "[p]roper enactment of the protections for religious freedom in the ICCPR" would not sweep away all the church concerns[51] because when Victoria passed the *Abortion Law Reform Act 2008* (Vic), it chose not to protect Doctor conscience at all.[52] Parkinson says that Frank Brennan was absolutely right in his scathing criticism:

> This was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable ICCPR human right.[53]

Australia could resolve this issue by passing a federal Religious Freedom or Anti-Religious Discrimination Act to trump inconsistent state and territory legislation, making it clear that institutional religious autonomy was preserved and could only be abrogated if doing so was necessary to "to protect public safety, order, health or morals or the fundamental rights and freedoms of others".[54] However, Australia has neither done so and nor does it look like it intends to do so any time soon despite the recommendations of the Ruddock Committee. Religious institutions, their human resources personnel, and their lawyers in Australia are thus obliged to chart a careful course around the various anti-discrimination laws when they hire personnel.

The provisions of the *Fair Work Act 2009* (Cth) are the most accommodating because they acknowledge and allow affirmative discrimination in employment in "an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed".[55] Even so, these provisions in federal employment law do not prevent the commencement of cases outside the employment arena alleging discrimination under state anti-discrimination law

despite the fact that the prospect of engaging the inconsistency provisions of the Commonwealth Constitution may discourage employment cases under state and territory anti-discrimination legislation.[56] Before discussing the approach that religious institutions, their human resources personnel, and their lawyers should take to accord with the most accommodating legislation available, though, the paper discusses the legal background in New Zealand.

B New Zealand

Save for the issues arising under the *Education Act 1989*, which are discussed below, the position in New Zealand is simpler because it is a unitary jurisdiction. However, the law does not accommodate the ethos needs of a religious institution as favourably as does the *Fair Work Act 2009* (Cth) in Australia. Section 15 of the *Bill of Rights Act 1990* provides

> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private

The Act, as a whole, sets out a vertical regime of general human rights protection which protects citizens against the government and so does not dictate to horizontal relationships between citizens.[57] To identify the human rights rules that apply horizontally between citizens, one must go to the *Human Rights Act 1993*. Part Two sets out what constitutes unlawful horizontal discrimination in New Zealand and includes discrimination in relation to employment matters.[58] The prohibited grounds of discrimination are set out in s 21 and have been greatly expanded since the Act's inception so that they now include sex, marital status, religious and ethical belief, colour, race and ethnic origin as well as disability, age, family status, and sexual orientation. Section 28 provides the limited exception in relation to religion:

> **28 Exceptions for purposes of religion**
>
> (1) Nothing in section 22 shall prevent different treatment based on sex where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of the religion.
>
> (2) Nothing in section 22 shall prevent different treatment based on religious or ethical belief where—
>
> (a) that treatment is accorded under section 464 of the Education Act 1989; or
>
> (b) the sole or principal duties of the position (not being a position to which section 464of the Education Act 1989 applies) -
>
> (i) are, or are substantially the same as, those of a clergyman, priest, pastor, official, or teacher among adherents of that belief or otherwise involve the propagation of that belief; or
>
> (ii) are those of a teacher in a private school; or
>
> (iii) consist of acting as a social worker on behalf of an organisation whose members comprise solely or principally adherents of that belief.
>
> (3) Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

In Australia the accommodation of religious belief set out in ss 153, 195 and 351 of the *Fair Work Act 2009* (Cth) allow affirmative discrimination in employment in "an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed." Yet, the NZ provision only extends to "different treatment based on sex where the position is for the purposes of an organised religion".[59] While the exception is extended under subs 2 to private schools which have elected to be 'part integrated' under the *Education Act 1989* in NZ, the benefit of the exception is not extended to church sponsored institutions which have not chosen to be integrated. Further, to the extent that the exception is extended to integrated schools, it does not extend to their administrative staffs even though their boards may want all teachers, chaplains, and counselors to follow the same faith.

For schools in NZ that have chosen to become integrated into the state system under the *Education Act 1989*, the position is a little different, but not much. For while s 416 provides that "an integrated school….shall continue to have the right to reflect through its teaching and conduct the education with a special character [it] provide[s]", and though the proprietors of integrated schools can opt out so as to regain any of the ethos they feel has been lost through the integration process,[60] they will find that difficult in practice. This is because despite the acknowledgment of special arrangements in favour of integrated schools in s 28(2) of the *Human Rights Act 1993* and s 416 of the *Education Act* itself, the *Education Act* does not provide any additional exemption from NZ law including from NZ anti-discrimination law.[61]

It is also doubtful that the 'opt out' power preserved to the proprietors of a religious school that has chosen to be integrated provides practical ethos protection because schools which opted to become integrated do not generally have the resources to continue operation on their own. There is also little ethos preservation incentive to 'opt out' of the integration program because 'opting out' does not provide any greater exemption from state anti-discrimination law than existed while the school was integrated.

The question then becomes whether the requirement to comply with 'the government ethos' accord with NZ's commitments to religious freedom under international human rights instruments? The NZ government's imposition of its will on religious sponsored institutions is compounded by the limitation of the exemption for organized religion[62] to discrimination based on sex. In theory, it is all right for organized religion to insist on male pastors, but under the exemption, organized religion cannot insist that male pastors observe conventional morality with a heterosexual orientation or that they be unmarried even though that standard may have been a tenet of the relevant faith for hundreds of years.

New Zealand's legislation is thus inconsistent with the standards of religious freedom set out in the *ICCPR* since 1966[63] and in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Religion Declaration) in 1981.[64] This is because the *ICCPR* holds in Article 2 that

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
   (c) To ensure that the competent authorities shall enforce such remedies when granted.

NZ has thereby committed legislatively to create an environment wherein individuals, including those in community with others, can enjoy the religious liberty set out in Article 18. The specific promise in relation to religious liberty and self-determination for individuals, including individuals in community with others is that

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect to have respect for the liberty of parents, and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The undertakings in the *Religion Declaration* are even more explicit. Article 1(3) for example, reiterates that limitations on religious belief and practice are only legitimate if they are prescribed by law and if they are "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others." Article 2(1) says that "[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief" and subs 2 says that

> 'intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

In Article 4 of the *Religious Declaration*, New Zealand also restated its promise to

> take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

The failure to enable all religions and religiously sponsored institutions in NZ the freedom to implement and live their ethos because of the limited nature of the exemptions provided in section 22 thereby offends international law.

III Practical Suggestions As to How Religious Organizations in Australia and NZ Can Preserve Their Ethos

While the secularity of the environments facing religious organizations sponsoring schools in Australia and NZ differ considerably, the common theme is that the State is imposing more restrictions and progressively limiting exemptions despite varying commitments to preserve religious freedom in their Constitutions, Bills and Charters of Rights, in the UN human rights instruments which they ratified, and in customary international law. What can sponsoring religious institutions and their derivate schools do to preserve their ethos' when it appears that affirmative discrimination to protect a religious standard would offend an anti-discrimination norm?

The position is simplest in Australia where the *Fair Work Act 2009* (Cth) allows affirmative discrimination in employment in "institution[s]…conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed".[65] I suggest that ethos preservation in employment is easiest in schools which implemented transparent awards or collective employment agreements which all employees understand at commencement of employment and to which they bind themselves. The position will not be as clear cut when the ethos protection rules are not so well understood. But this protection is not a panacea for all of schools' likely anti-discrimination problems because it only applies in the employment arena. It is unlikely to protect affirmative ethos discrimination in student enrolment or in ethos practices that discriminate on prohibited grounds in other parts of the school's life.

In NZ, even in the case of integrated schools, affirmative discrimination to protect schools' ethos will breach the law if there is a complaint. No provision in NZ law positively allows employers to publish transparently their ethos preservation rules in employment and then enforce them. Although the Human Rights Commission may not actively enforce all of its anti-discrimination norms against the ethos protection practices of religious institutions and their schools, they have the power to do so because most ethos protection practices offend NZ laws.

In practice, religious sponsored institutions in both countries will likely take a combination of the following steps to try and avoid legal actions in consequence of unlawful discrimination in employment or elsewhere at schools. They will only advertise positions among those who subscribe to their ethos'. They will integrate ethos-related duties into all job descriptions and will emphasize the essentiality of the ethos qualifications to applicants' success in the role and in the manner that would make it difficult for any would be complainants to argue that the ethos requirements were not a genuine occupational requirement for a person appointed to such a role.

The need for position holders to uphold institutional ethos at all times both at work and in private as a matter of employer loyalty while preserving the confidence and trust of all of the institution's stakeholders, would also be clearly set out in employment contract documents; doing so would enable the possible dismissal of persons who strayed from their institutions' ethos after appointment. In the event of challenges to such dismissals, institutional authorities would also make reinstatement appear impractical to employment courts so that damages for breaches of the relevant discrimination law(s) would present as the only viable remedy.

Ethos preservation beyond the employment sphere is less predictable. The most likely challenges would come from students or parents challenging the ethos seeking enrolment or post admission.[66] This likelihood again suggests that institutional promotions would focus on the faithful with emphases on practices unlikely to appeal to persons outside the institution.

None of these practical steps would protect institutions from determined rights crusaders with undetectable covers. But, if such activists did infiltrate institutions, it is submitted that courts

exercising equitable jurisdiction would always be sympathetic to the argument that the institutions had been transparent. If such clean hands arguments were coupled with defenses sourced in international law premised in institutional religious autonomy protected by international law despite opposed local legislation, there is every possibility that courts might find ways to preserve the ethos.

IV Conclusion

This article set out the legislative regimes in Australia and NZ making it difficult for schools sponsored by religious institutions to maintain their ethos while simultaneously complying with applicable anti-discrimination laws. After analyzing the law of both countries, the article concluded that Australia's law is friendlier towards religious schools. This is because s 153 of the *Fair Work Act 2009* (Cth) allows the creation of collective employment agreements which include provisions to preserve the ethos of institutions "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed".

In NZ, the government's anti-discrimination legislation outlaws ethos preservation in any school. This is because the only exception allowed under s 28 of the *Human Rights Act 1993* – restricting a position to one sex "to comply with the doctrines or rules or established customs of the religion" - does not also allow sponsoring institutions to discriminate affirmatively to preserve their moral codes in manners that might offend NZ's more recent anti-discrimination norms.

Keywords: ethos protection, religious freedom, religious liberty, religious discrimination, positive discrimination

Endnotes

1 See for example <https://www.newshub.co.nz/home/new-zealand/2017/02/losing-our-religion-kiwis-losing-the-faith-in-record-numbers.html>, and <http://www.skepticink.com/tippling/2014/01/09/the-terminal-decline-of-christianity-in-new-zealand/>.

2 According to the Australian Bureau of Statistics, 34.4% of all Australia primary and secondary students attended non-government schools in 2017 <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4221.0>. Combined Commonwealth and State funding for those schools was set to exceed $15 billion by 2018 and combined funding for public schools would reach $40 billion by the same time <http://www. ncoa.gov.au/report/appendix-vol-1/9-7-schools-funding.html>. This source no longer exists. See also <https://www.education.gov.au/how-are-schools-funded-australia>. The NZ numbers are much smaller at less than 15%, but those numbers are increasing. Overall enrolments increased more than 25% between 2000 and 2007 (<http://www.scoop.co.nz/stories/ED0712/S00087/independent-school-enrolments-rise-by-25.htm>) and that trend is continuing (<http://www.teara.govt.nz/en/private-education/page-1>).

3 For the US, see Robert D. Putnam and David E. Campbell's *American Grace*, Simon and Schuster, 2010, New York, London, Toronto, Sydney, 497-498. For NZ, see the increasing number of enrolments in private and integrated schools, above n2.

4 *Australian Constitution*, s 116. It reads: 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' The Australian Commonwealth can create codes of anti-discrimination law which trump inconsistent State law when they implement international human rights treaties in domestic

law, but to date the only human rights related treaties that they have implemented have concerned race (*Racial Discrimination Act 1975* (Cth)), and rights for women (*Sexual Discrimination Act 1984* (Cth)) and workers (*Industrial Relations Act 1988* (Cth)). Despite a recommendation from the Human Rights and Equal Opportunity Commission in 1998 that the Commonwealth implement a Religious Freedom Act to protect religious liberty in Australia (*Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998) in accord with commitments under the *International Covenant on Civil and Political Rights 1966* (*ICCPR*) and the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, (the *'Religion Declaration'*), they have not done so. See further discussion below.

5 The US *First Amendment*, adopted in 1791 as part of the *Bill of Rights*, reads: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof….'

6 *Attorney-General (Vic); Ex rel Black v Commonwealth* (*DOGS case*) (1981) 146 CLR 599.

7 *Williams v Commonwealth of Australia* (2012) 248 CLR 156 and *Williams v Commonwealth* (2014) 252 CLR 416.

8 Above n2. In the recent New South Wales Supreme Court of Appeal case *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2016] NSWCA 157, the Court concluded that s 116 does not curtail government funding of religious schools for neutral purposes such as education. For this reason, the Court has 'upheld numerous schemes whereby government funds are distributed to schools for secular non-religious purposes' [263].

9 The *Anti-discrimination Act 1977* (NSW) outlaws discrimination based on race, sex, transgender, marital or domestic status, disability, responsibilities as a carer, homosexuality, HIV and AIDS and age. See below nn 22-28.

10 <www.theage.com.au/victoria/religious-instruction-scrpped-from-curriculum-20150820-gj425e.html> and < https://www.education.vic.gov.au/school/principals/spag/curriculum/Pages/sri. aspx>.

11 <http://mobile.abc.net.au/news/2016-03-1/safe-schools-anti-bullying-victorian-government-to-continue/7260268>.

12 <http://www.smh.com.au/federal-politics/political-news/government-reveals-changes-to-controversial-safe-schools-program-20160318-gnlyhj.html> and <https://www.abc.net.au/news/2017-04-16/safe-schools-program-ditched-in-nsw/8446680>.

13 *Hozack v Church of Jesus Christ of Latter-day Saints* (1997) 79 FCR 441.

14 *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2014); appeal allowed (2006) 15 VR 207.

15 *Christian Youth Camps Ltd v COBAW Community Health Services Ltd et ors* [2014] VSCA 75.

16 *Charter of Human Rights and Responsibilities 200*6 (Vic).

17 *Racial and Religious Tolerance Act 2001* (Vic).

18 <http://mobile.anc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>. This source no longer exists. See also <https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submissions/martine-delaney>.

19 *Discrimination Act 1998* (Tas); <http://catholictalk.com.au/walking-the-talk/blog/item/784-tasmania-anti-discrimination>.

20 Ibid.

21 *Constitution Act 1934* (Tas) section 46. It reads

1. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
2. No person shall be subject to any disability or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

22 The relevant instruments are: The *Racial Discrimination Act 1975* (Cth); The *Sexual Discrimination Act 1984* (Cth); The *Disability Discrimination Act 1992* (Cth); The *Age Discrimination Act 2004* (Cth); The *Fair Work Act 2009* (Cth); The *Anti-Discrimination Act 1977* (NSW); The *Equal Opportunity Act 2010* (Vic); The *Anti-Discrimination Act 1991* (Qld); The *Equal Opportunity Act 1984* (WA); The *Equal Opportunity Act 1984* (SA); The *Anti-Discrimination Act 1998* (Tas); The *Discrimination Act*

1991 (ACT); the *Anti-Discrimination Act* (NT), and the Victorian *Racial and Religious Tolerance Act 2001*.

23 Part 2.

24 Parts 3 and 3A.

25 Part 4.

26 Part 4A.

27 Part 4B.

28 Part 4C.

29 Parts 4E and 4G.

30 For example, in *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGs Cas*e) (1981) 146 CLR 559, Murphy J said that human rights guarantees should be interpreted liberally so as not to nullify the protection intended (ibid 622 and 631-634) and on that point Barwick CJ agreed with him (ibid 577) though Mason J suggested that because the religious freedom expressed in s 116 of the *Constitution* was expressed as a restriction on power, that liberal interpretation principle should not apply (ibid 614-615). However, the High Court ruled that the guarantee expressed in s 51(xxxi) should be interpreted generously even though it practically restricts Australian Commonwealth power (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261).

31 There were earlier versions of the Act in 1977, 1984 and 1995.

32 Section 153 discusses the provisions of 'Modern Awards'. It exempts discrimination which is necessary in accordance with religious practice:

Certain terms are not discriminatory

(2) A term of a modern award does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted *in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*:

(i) in good faith; and

(ii) to avoid *injury to the religious susceptibilities of adherents of that religion or creed* [similar words italicized].

33 Section 195 discusses the terms of 'Enterprise Agreements'. It exempts discrimination which is necessary in accordance with religious practice:

Discriminatory term

(1) A term of an enterprise agreement is a ***discriminatory term*** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Certain terms are not discriminatory terms

(2) A term of an enterprise agreement does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

34 Section 351, which forbids discrimination generally, confirms that the prohibition does not extend to religious discrimination when it is required by the relevant religious faith:

(2) However, subsection(1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:
(i) in good faith; and
(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an anti-discrimination law :
(aa) the *Age Discrimination Act 2004* ;
(ab) the *Disability Discrimination Act 1992* ;
(ac) the *Racial Discrimination Act 1975* ;
(ad) the *Sex Discrimination Act 1984* ;
(a) the *Anti-Discrimination Act 1977* of New South Wales;
(b) the *Equal Opportunity Act 2010* of Victoria;
(c) the *Anti-Discrimination Act 1991* of Queensland;
(d) the *Equal Opportunity Act 1984* of Western Australia;
(e) the *Equal Opportunity Act 1984* of South Australia;
(f) the *Anti-Discrimination Act 1998* of Tasmania;
(g) the *Discrimination Act 1991* of the Australian Capital Territory;
(h) the *Anti-Discrimination Act* of the Northern Territory.

35 *Deen v Lamb* [2001] QADT 20 (8 December 2011).

36 For example, consider the cases behind the High Court and NSW Court of Appeal's decision respectively in *Burns v Corbett* [2018] HCA 15 and *Burns v Corbett* [2017] NSWCA 3. While the Court of Appeal overruled various NCAT decisions on jurisdictional grounds in that decision and did not address the freedom of political communication arguments that had been lost by Corbett and Gaynor in NCAT trials, the fact that NCAT missed the jurisdictional point decided by the Court of Appeal and could not factor religious liberty and freedom of speech considerations into its decisions has disturbed many educated religious believers.

37 Carolyn Maree Evans, *Legal Protection of Freedom of Religion in Australia*, The Federation Press, Leichardt, New South Wales, 1990, chapter 6.

38 Ibid 139 citing Fyfe, Costello, Brennan, de Kretser and Croome.

39 Patrick Parkinson, "Christian Concerns about an Australian Charter of Rights", (2010) 15(2) *Australian Journal of Human Rights* 83, 87.

40 Ibid.

41 Ibid 89

42 Ibid 90.

43 Ibid 91.

44 Ibid 94.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid 96.

49 *ICCPR* Article 18(3).

50 Parkinson, above n37, 98-101.The new Human Rights Acts 2019 (Qld) passed on 27 February 2019 similarly departs from the international religious freedom protection standard by allowing laws which reasonably interfere with religious practice rather than doing so when such interference is objectively necessary.

51 Ibid 101.

52 Ibid 104.

53 Ibid 105 quoting Frank Brennan "The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience", paper given at the conference *Values and Public Policy: Fairness, Diversity and Social Change,* Centre for Public Policy, University of Melbourne, 19 February 2009.

54 *ICCPR* Article 18(3).

55 Sections 153, 195 and 351

56 Section 109 of the Australian Constitution provides that the Commonwealth law shall prevail when there is inconsistency between state and Commonwealth laws. However, it is not always a simple matter to establish whether there is direct or indirect inconsistency between the two levels of law and the High Court has sometimes found that apparently inconsistent laws can co-exist since they were operating in different fields (e.g. *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 and *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237).

57 For example, section 3 provides

3 Application

This Bill of Rights applies only to acts done—

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

58 The general provision, before numerous exceptions, provides

22 Employment

(1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—

(a) to refuse or omit to employ the applicant on work of that description which is available; or

(b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or

(d) to retire the employee, or to require or cause the employee to retire or resign, —

by reason of any of the prohibited grounds of discrimination.

(2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

59 Section 28, *Human Rights Act 1993.*

60 Section 416 (3)(4) of the *Education Act 1989.*

61 Note, however, that since 2017, s 422(1)(f) has allowed integrated schools to limit the number of non-ethos students even if places are available, but it is unclear whether such enrolment could be reduced to zero or what would happen if an existing student changed her mind about the ethos. Section 442 states 'children of parents who have a particular or general philosophical or religious connection with a State integrated school must be preferred to other children for enrolment at the school.' But s 445 (2)(a)(b) requires that when these special character integrated schools allow non-ethos student enrolment, those students with "different philosophical or religious affiliations" must be allowed to opt out of the religious instruction that has historically given the school its "special character".

62 Section 28(1) of the *Human Rights Act 1993.*

63 Note that New Zealand ratified the *ICCPR* on 28 December 1978 and the Optional Protocol, which invites the UN Human Rights Committee to consider complaints from New Zealand after all domestic legal avenues have been tried. Her reservations do not touch the promise to afford her citizens and residents religious freedom in the terms set out in the Covenant.

64 Note that as recently as 2005, New Zealand recommended the adoption of Resolution 60/166 which reiterated this Declaration *Resolutions and Decisions adopted by the General Assembly during its sixtieth session,* Volume One, 13 September to 23 December 2005, General Assembly, Official Records, Sixtieth Session, Supplement No. 49 <A60/49>.

65 Sections 153, 195, and 351.

66 See the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018. The Bill was introduced into the Senate on 29 November 2018 by Senator the Hon Penny Wong to prevent discrimination by schools against students based on grounds relating to sexual orientation, gender identity or intersex status. On 6 December 2018 the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Committee concluded that although such students should be protected from discrimination, "this should not occur at the expense of the ability of religious educational institutions to maintain their ethos through what they teach and the rules of conduct that they impose on their students" [3.80]. It therefore recommended that the Bill not be passed but instead the Bill be referred to the Australian Law Reform Commission for further review. Although the recommendation was that the current Bill should not be passed, its very existence illustrates the very real challenge to ethos preservation in faith-based schools.